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9 *Attorneys for Plaintiff* ABANTE ROOTER
10 AND PLUMBING, INC. and the alleged Class

11
12 **UNITED STATES DISTRICT COURT**
13
14 **NORTHERN DISTRICT OF CALIFORNIA**
15
16 **OAKLAND DIVISION**

17 **ABANTE ROOTER AND PLUMBING,**
18 **INC.,** a California corporation, individually
19 and on behalf of all others similarly situated,

20 Plaintiff,

21 v.

22 **UNLOCKED BUSINESS STRATEGIES,**
23 **INC.,** a New York corporation, and
24 **THOMAS R. COSTA,** an individual,

25 Defendant.

Case No. 4:19-cv-07966-JST

**MOTION FOR LEAVE FILE
PLAINTIFF'S SECOND AMENDED
CLASS ACTION COMPLAINT AND
TO EXTEND THE DEADLINE TO
SERVE ALL DEFENDANTS**

26 Plaintiff Abante Rooter and Plumbing, Inc. ("Abante" or "Plaintiff") respectfully moves
27 the Court for an Order permitting it to file a Second Amended Class Action Complaint and to
28 Extend the Deadline to Serve All Defendants. In support of this motion, Plaintiff states as follows:

1. Plaintiff filed its Class Action Complaint on December 4, 2019, against Unlocked
Business Strategies, Inc. ("UBS"). (Dkt. 1.)

2. Fed. R. Civ. P. 4(m) requires that all defendants must be served "within 90 days
after the complaint is filed[.]" As such, Plaintiff's deadline to serve all Defendants was March 3,

1 2020.

2 3. On December 12, 2019, Plaintiff served, via process server, UBS with the
3 Complaint, Summons, and other initiating documents. (Dkt. 14.) Thereafter, UBS failed to appear
4 or respond.

5 4. On February 17, 2020, Plaintiff filed its First Amended Class Action Complaint
6 (“Complaint”), which named Thomas Costa (“Costa”) (collectively with UBS “Defendants”) as
7 an additional defendant. (Dkt. 15.) Costa was the Chief Executive Officer of UBS. (Dkt. 15 ¶ 6.)

8 5. Plaintiff served Defendant UBS on February 24, 2020 (dkt. 18), placing its
9 deadline to respond on March 16, 2020.

10 6. Plaintiff then served Costa on February 26, 2020 (dkt. 19), placing his deadline to
11 respond on March 18, 2020.

12 7. To date, neither defendant has entered an appearance, responded to the Complaint,
13 or reached out to Plaintiff’s counsel.

14 8. Following a review of emails exchanged between Plaintiff and UBS, it is clear that
15 UBS and Costa engaged in telemarketing on behalf of and for the benefit of Merchant Industry,
16 LLC d/b/a Swipe4Free (“Swipe4Free”). That is, Defendants exclusively sold Swipe4Free’s
17 products and services and acted as an affiliate of Swipe4Free.

18 9. As such, Plaintiff now seeks to amend his Complaint to add Swipe4Free as an
19 additional defendant.

20 10. “A district court ‘should freely give leave’ to amend a pleading ‘when justice so
21 requires.’” *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2013 WL 3339443, at *1 (N.D.
22 Cal. July 1, 2013) (citing Fed. R. Civ. P. 15). “Four factors are commonly used to determine the
23 propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the
24 opposing party, and futility of amendment.” *Id.* (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d
25 183, 186 (9th Cir.1987)). However, not “all factors merit equal weight”. *Id.* Instead, “it is the
26 consideration of prejudice to the opposing party that carries the greatest weight.” *Id.* (citing
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1 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003)).

2 11. Further, the Court may also extend the deadline for service of process upon finding
3 good cause for failing to serve the defendant in the required time. *Gillis v. City & Cty. of San*
4 *Francisco*, No. C 08-3871 SBA, 2009 WL 5215400, at *1 (N.D. Cal. Dec. 28, 2009). “Good
5 cause means, at a minimum, excusable neglect.” *Id.* (citing *Boudette v. Barnette*, 923 F.2d 754,
6 756 (9th Cir.1991)). “The Court, in its discretion, may grant an extension even in the absence of
7 good cause.” *Id.*

8 12. Here, Plaintiff moves the Court for leave to amend its complaint to include
9 Swipe4Free as an additional defendant. Swipe4Free received the benefit of, knew about, and
10 ratified all of the calls placed by UBS and Costa. That is, UBS was the affiliate of Swipe4Free
11 and exclusively sold Swipe4Free’s products. After UBS sold its products, Swipe4Free provided
12 all support and customer service for the products sold. Indeed, Swipe4Free is a responsible party
13 under the TCPA. Plaintiff’s Proposed Second Amended Complaint is attached hereto as Exhibit
14 A.

15 13. Moreover, permitting Plaintiff to file and serve the Second Amended Complaint
16 would not prejudice any defendant. That is, UBS and Costa have both completely refused to
17 respond to the litigation in any fashion. Further, refusing to permit Plaintiff to add Swipe4Free
18 will require Plaintiff to dismiss the current action without prejudice, and re-file essentially the
19 same action against all three defendants. In short, granting Plaintiff leave to amend would have
20 the same result.

21 14. Finally, given that the deadline to serve all defendants expired on March 3, 2020,
22 Plaintiff requests a brief extension of the time to serve all defendants to 30 days after the filing of
23 the Second Amended Complaint. To date, Plaintiff has diligently and repeatedly served UBS and
24 Costa. Further, Plaintiff seeks this extension to include Swipe4Free as an additional defendant
25 that is responsible for the calls to Plaintiff. This extension is not sought for an improper purpose.

26 15. Consequently, Plaintiff respectfully moves the Court for an order granting leave to
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1 file its Second Amended Complaint, and permitting Plaintiff thirty (30) days to effectuate service
2 upon all defendants.

3 Therefore, Plaintiff respectfully requests that the Court grant Plaintiff leave to file its
4 Second Amended Complaint, extend the deadline to serve all defendants to thirty days following
5 the filing of the Second Amended Complaint, and for such additional relief as the as the Court
6 deems necessary and just.

7
8 Dated: March 24, 2020

Abante Rooter and Plumbing, individually and on
behalf of all others similarly situated,

9 By: /s/ Taylor T. Smith
10 One of Plaintiff's Attorneys

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27 *Pro Hac Vice

28 *Counsel for Plaintiff and the Putative Class*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above titled document was served upon counsel of record by filing such papers via the Court's ECF system on March 24, 2020.

/s/ Taylor T. Smith